SUPREME COURT, U. S.

OCT 6 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73 616

MICHAEL A. S. MAKRIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner, MICHAEL A. MAKRIS, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on August 14, 1973.

CITATIONS TO OPINIONS BELOW

By a decision (unreported at this date) which appears as "Appendix A" to the Petition, the Court of Appeals reversed, in part, and remanded the judgment of the District Court for the Southern District of Texas.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on August 14, 1973. A Petition for Rehearing was denied on September 7, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

(1) Does the failure of the District Court to comply with the mandatory procedures for determining an accused's mental competency to stand trial set out in 18 U.S.C. § 4244 require vacating the conviction (as required by the Ninth Circuit Court of Appeals), rather than remanding for a hearing to determine his mental condition *nunc pro tunc* (as required by the Fifth Circuit in this and other cases)?

(2) May a perjury conviction under 18 U.S.C., Section 1621 be based upon an answer which is literally untrue only when read out of context of the series of questions propounded, but literally and technically true when placed in context?

(3) May a conviction which is reversed be retried at the discretion of the prosecution when conviction upon other counts of the same indictment are remanded for a rehearing to determine Petitioner's competency to stand trial originally on the other counts of the same indictment?

STATUTES INVOLVED

The following statutes are involved:

Title 18 U.S.C. §§ 1621, 4244.

STATEMENT

Petitioner was convicted on all three counts of an indictment charging perjury in violation of Title 18 U.S.C., Section 1621 during an official proceeding of the Securities and Exchange Commission investigating the alleged "Sharpstown Bank Scandal." Prior to trial the Government filed an application for a mental examination of Petitioner pursuant to 18 U.S.C. § 4244, and the District Court granted the request. The report of the government's psychiatrist, in the words of the Court of Appeals, "put forward a well-documented doubt whether [Petitioner] was capable of participating in his own defense (App. 20)." The District Court, however, did not conduct a hearing to determine Petitioner's mental competency to stand trial, in conflict with the mandatory requirements of 18 U.S.C. § 4244.

Because of this error, the Court of Appeals remanded the convictions on Counts II and III of the indictment for a hearing on Petitioner's competency to stand trial in June, 1972. The Court of Appeals reversed the conviction on Count I of the indictment, stating that retrial on Count I was within the discretion of the prosecution. The Court, however, refused to reverse Counts II and III. These latter charges had been unsuccessfully attacked by Petitioner in his Motion to Suppress, which in effect was a plenary hearing on his sanity at the time of the offense.

FACTS

In April 1970, approximately eight months prior to his testimony before the S.E.C., Petitioner underwent brain surgery for the removal of pituitary adenoma. It

was uncontested that this type of radical surgery will effect in varying degree the behavior, personality and mental condition of the subject.

The Petitioner was subpoenaed sometime after December 1, 1970, (Gov. Ex. 3) to appear before the Securities and Exchange Commission on December 16, 1970, to answer questions and bring certain documents relating to its investigation of Ling & Company and National Bankers' Life Insurance Company (Gov. Ex. 4). The Petitioner appeared as directed and having been sworn (according to Gov. Ex. 4, p. 4) gave testimony (Gov. Ex. 4) and was indicted for allegedly perjuring himself in the following dialogue:

COUNT I:

Q. All right. In connection with—let's call it the securities aspect here—have you ever indicated to Mr. Sharp—we were talking about this trust fund, so to speak, of securities allegedly deposited by refugees of Nazi Germany—that you might be able to obtain an interest for him in this or to bring these securities to the United States for his benefit?

A. None at all.

Q. All right.

A. Not at all. Mr. Sharp, like I say, is a very quiet person.

Q. Yes.

A. I had no conversation with him about it.

COUNT II:

Q. All right. Now, concerning this alleged trust fund of securities, we have information indicating that

it's alleged to have initially been an amount in excess of two hundred million dollars, and that there were arrangements made for the two hundred million dollars to be turned over to Catholic societies, principally Loyola University. Do you have any knowledge of that transaction?

A. No.

Q. Have you ever had any dealings with Father Kennelly? Do you know Father Kennelly?

A. Yes, I know him.

Q. I believe it's spelled K-e-n-n-e-l-l-y.

A. Yes, my son was going to go to his school.

Q. All right. And have you ever discussed this particular thing, this trust fund, with Father Kennelly?

A. No.

Q. What have been your conversations with Father Kennelly?

A. School.

Q. Just social conversations?

A. Yes, social.

Q. They haven't involved any finances?

A. Absolutely not.

COUNT III:

Q. All right. You are familiar with the name Bedrock Petroleum, is that correct?

A. No.

Q. Have you ever heard of it before?

A. No, I haven't.

The case was tried to the court beginning June 6, 1972, the Petitioner having waived a jury (Vol. 1, R. 1178) with the consent of the government (Vol. 1, R. 1200). On June 16, 1972, the District Court found Petitioner guilty on all three counts and sentenced him August 28, 1972, to serve four years on Count I, four years on Count II and five years probation on Count III, all to run consecutively.

REASONS FOR GRANTING THE WRIT

I.

Knowingly or unknowingly, the Court of Appeals for the Fifth Circuit has laid a trap from which Defendant cannot escape by its holding that the failure of the District Court to provide a Section 4244 hearing prior to the time of trial can be cured by a *nunc pro tunc* hearing years after the event.

The Ninth Circuit Court of Appeals has relieved the accused of the pitfalls of the Fifth Circuit's holding by consistently ruling that failure to comply with the procedures set out in section 4244 results in vacating the judgment rather than remanding. The Ninth Circuit, with good reason, hews to the literal dictates of Section 4244 that prior to putting the accused to trial, "the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted . . ." *United States v. Irvin,* 450 F.2d 968 (9th Cir. 1971); *Morris v. United States,* 414 F.2d 258 (9th Cir. 1969); *Meador v. United States,* 332 F.2d 935 (9th Cir. 1964): Also see *Holloway v. United States,* 343 F.2d 265, 267 (D.C. Cir. 1964); but see *United States v. Taylor,* 437 F.2d 371, 379 (4th Cir. 1971).

The trap in the Fifth Circuit's departure from the language of the statute is set forth in the Court's own opinion in the instant case. There, the Court said (App. 17): "It is clear that the probative force of expert testimony is lessened when it is based on observations of the Defendant at a time remote from the offense."

The Court of Appeals used this statement to vitiate the testimony of the Government's psychiatrist as to Petitioner's lack of mental capacity at the time of the offense. The court pointed out that the psychiatrist's observations were made more than 16 months after the S.E.C. hearing.

Yet in remanding for a *nunc pro tunc* hearing, any present observations of the Petitioner for purpose of a Section 4244 hearing will be made years after the June, 1972 trial. Sixteen months has elasped since the trial to the date of the writing of this petition.

Psychiatric testimony and other testimony presented at the trial was offered only in connection with Petitioner's motion to suppress. This motion was directed primarily at Petitioner's competency at the time of the offense. A timely hearing with evidence of Petitioner's competency to stand trial would suitably have been prepared and presented fully at a Section 4244 hearing.

In remanding, the Court of Appeals contemplated that additional evidence should be presented now by the prosecution and the defense (App. 23).

Petitioner can now be examined by twelve psychiatrists and could bring in twelve priests or twelve angels to testify as to his defective condition in June of 1972. The District Court, however, could discount all such additional defense testimony as conjecture, based upon

its true statement that "the probative force of expert testimony is lessened when it is based on observations of the defendant at a time remote from the [event]."

The inescapable conclusion is that the Court of Appeals has invited the District Court to make a finding of competency, since any present observation of Petitioner's behavior on behalf of the defense will be vitiated as indicated above.

Petitioner urges this Honorable Court to resolve the conflict in favor of the holdings of the Ninth Circuit which carry out the mandate of Congress.

II.

In leaving the retrial of Count I in the discretion of the prosecution, the Court of Appeals overlooked its own mandate to the District Court to provide a Section 4244 hearing on Counts II and III. This anomaly, which was brought to the Court's attention in Petitioner's Motion for Rehearing, means that if the prosecution does decide to retry Count I, and Petitioner seeks a Section 4244 hearing as to Count I at that time, the hearing will be left in the confused state of *nunc pro tunc* evidence of Petitioner's capacity to stand trial in June, 1972, on Counts II and III and Petitioner's current mental competency to stand trial on Count I. Psychiatry at best is a trained analysis and conjecture of behavior. That already-overburdened science will now be further burdened by the failure of the District Court to provide a Section 4244 hearing in the first place, as directed by Congress.

III.

Apart from the above, a very serious question is presented by the trap for the unwary laid by the investigator in his leading questions which were the basis of the conviction in Count II of the indictment.

This Court has unanimously rejected the suggestion that a defendant may be convicted for perjury solely on the basis of his deceptive intentions (*Bronston v. United States,* 93 S.Ct. 595), and is now presented with a corollary to that proposition. That is, may a Defendant be convicted for perjury where the questions of the interrogator lead the accused into a statement which is literally untrue but substantively true in the context created by the interrogator.

In reversing Count I the Court of Appeals repeatedly referred to the narrow particularity of the subject matter of the questioning before the S.E.C. and the lack of proof as to the existence of the fund of securities, repeatedly described by the examiner as having been deposited in Zurich, Switzerland by refugees of Nazi Germany. Indeed the Court of Appeals reversed the conviction on the first count because all of the testimony indicated that Petitioner had not discussed any such fund.

The first of the questions and answers set forth in Count II referred to the selfsame securities, the existence of which was never proven by the government. Suddenly the interrogator asked Petitioner if he had a conversation involving any finances with a Father Kennelly, head of the University at which Petitioner's son was attending. The Court of Appeals upheld the conviction on Count II because of the Appellant's negative answer to this

one question, stating that there was evidence that Petitioner had discussed some finances with Father Kennelly, although there never was any evidence that the discussion involved the particular fund which had been the basis for the entire interrogation relating to European Securities.

The basis for the Court of Appeals affirmance of the Count II conviction, (remanding only for a competency hearing) was that some finances were discussed, and Petitioner's answer that there were not, was literally untrue.

If the perjury conviction here were to be sustained upon that question above, then any literally untrue answer would constitute perjury regardless of the immateriality of the answer. Thus, if Petitioner had discussed finances by way of his son's tuition at Father Kennelly's school or the condition of the Dow Jones Industrial Average as part of what in Petitioner's mind were the "social conversations" in the leading question of the interrogator, then this would constitute perjury because "finances were discussed." This literal untruth is however literally and technically correct, if by taking the question regarding finances in context, Petitioner meant that he never discussed the particular fund or refugee securities in Zurich with Father Kennelly. There was not a scintilla of evidence that Petitioner ever discussed that fund with Father Kennelly. (*Bronston v. United States,* 93 S.Ct. 595).

IV.

Finally the Fifth Circuit opinion should be reversed inasmuch as there was no competent evidence to contro-

vert the Government's psychiatrist's testimony that the Appellant was insane at the time of the S.E.C. hearing; rather the District Court relied on lay evidence alone, which merely placed the Appellant in his comfortable world of high finance, while totally ignoring the sort of stress situations described by the psychiatrist as destroying the mental facilities of the accused. The hearing before the S.E.C. was a situation creating such stress for the Petitioner that according to the psychiatrist he lost his ability to conform his conduct to the requirements of law; in fact the Government psychiatrist was especially impressed by the fact that the Petitioner was unrepresented by counsel at the hearing and was, eight months post operative to the removal of a brain tumor, left alone to face an intense interrogation by the examiner. *Mims v. United States,* 375 F.2d 135, 143 (5th Cir. 1967), and reversal has been occasioned by insufficient evidence of sanity *Hartford v. United States,* 362 F.2d 63 (9th Cir. 1966); *Buatte v. United States,* 330 F.2d (9th Cir. 1964); *Argent v. United States,* 325 F.2d 162 (5th Cir. 1963); *Beltran v. United States,* 302 F.2d 48 (1st Cir. 1962); *Isaac v. United States,* 109 U.S. App. D.C. 34, 284 F.2d 168 (1960); *Fitts v. United States,* 284 F.2d 108 (10th Cir. 1960); *United States v. Westerhause,* 283 F.2d 844 (7th Cir. 1960); *Pollard v. United States,* 282 F.2d 450 (6th Cir. 1960); *Hopkins v. United States,* 107 U.S. App. D.C. 126, 275 F.2d 155 (1959); *Satterwhite v. United States,* 105 U.S. App. D.C. 398, 267 F.2d 675 (1959); *Fielding v. United States,* 102 U.S. App. D.C. 167, 251 F.2d 878 (1957); *Wright v. United States,* 102 U.S. App. D.C. 36, 250 F.2d 4 (1957); *Douglas v. United States,* 99 U.S. App. D.C. 232, 239 F. 52 (1956). But see *King v. United States,*

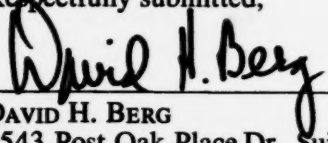
372 F.2d 383 (D.C. Cir. 1967); *Hawkins v. United States,* 114 U.S. App. D.C. 44, 310 F.2d 849 (1962), where guilty verdicts were affirmed although defendant's expert testimony was uncontradicted by the government.

Moreover this circuit has only recently reversed a conviction presenting far greater evidence of sanity than that presented by the prosecution in this case, *Nagell v. United States,* 5 Cir. 1968, 392 F.2d 934, where substantial medical testimony was offered to refute psychiatric testimony favorable to the defense.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2915

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL A. S. MAKRIS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

(August 14, 1973)

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

CLARK, Circuit Judge: Michael A. S. Makris was convicted in a non-jury trial on three counts of perjury in violation of 18 U.S.C. §1621. On appeal Makris

makes three primary contentions: (1) his sworn answers to questions propounded by an examiner for the Securities and Exchange Commission were not perjurious; (2) the evidence was insufficient to support the court's finding that he was sane at the time of the alleged offenses; and (3) he was improperly denied a hearing under 18 U.S.C. §4244 to determine his competency to stand trial.

We find that the court below erred in denying Makris the full procedural rights mandated by 18 U.S.C. §4244, and therefore remand for further proceedings in respect to the appellant's ability at the time of trial to participate in his own defense.[1] Regardless of the outcome of this required procedure, the remaining points raised ought to be reached now. If Makris was competent to stand trial, then such rulings end the cause. If he was not competent, the resolutions will guide any retrial that may be had.

PERJURY

In December 1970 Makris appeared before officers of the Securities and Exchange Commission to testify concerning his connection with National Bankers Life Insurance Company and Ling & Company. Information available to the Commission indicated that Makris had been a promoter of securities transactions involving the two companies under investigation. The first transaction involved Frank Sharp, a Houston banker, real estate developer, and principal party in both the Sharpstown State

1. In regard to the appellant's additional contention, we find no abuse of discretion in the failure to disclose the presentence report. See United States v. Frontero, 452 F.2d 406, 411 (5th Cir. 1971).

Bank and the National Bankers Life Insurance Company. The indications were that in contacts with Sharp, Makris had offered to obtain access to a large fund of bonds and other blue-chip securities of major American corporations which were reportedly held by bankers in Switzerland. The alleged scheme entailed the purchase of the securities, worth up to $200,000,000, for as little as ten percent of their face value. The SEC also thought that Sharp and Makris had contacted members of the Jesuit Order for the purpose of obtaining "seed" money for the purchase of the securities. The second and less grandiose transaction involved the purchase of control in a small West Virginia oil company, Bed Rock Petroleum, and the fraudulent inflation of the market value of its stock in order to finance the acquisition of a Houston-based food processing company and restaurant chain.

Makris was convicted on three counts of perjury in regard to his testimony before the SEC.[2] He now contends that as to each count the evidence was insufficient to establish the knowing falsity of his sworn responses required to sustain a conviction under 18 U.S.C. §1621.[3]

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2. Makris was sentenced to four years imprisonment on each of Counts I and II and to five years probation on Count III, all sentences to run consecutively.

3. "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $20,000 or imprisoned not more than five years, or both. . . ."

The basic element of the crime of perjury is that the challenged sworn testimony must be false. No one may be lawfully convicted of perjury where he gives an answer which is "literally accurate, technically responsive, or legally truthful." *United States v. Wall,* 371 F.2d 398, 400 (6th Cir. 1967); *Smith v. United States,* 169 F.2d 118, 121 (6th Cir. 1948). It is the obligation of the government to prove to a moral certainty that the defendant "purposefully misstated the fact knowing it to be false and untrue." *Van Liew v. United States,* 321 F.2d 674, 679 (5th Cir. 1963).

In Count I Makris was convicted on the basis of the following testimony concerning his business dealing with Frank Sharp:

> Q. All right. In connection with—let's call it the securities aspect here—have you ever indicated to Mr. Sharp—we were talking about this trust fund, so to speak, of securities allegedly deposited by refugees of Nazi Germany—that you might be able to obtain an interest for him in this or to bring these securities to the United States for his benefit?
> A. None at all.
> Q. All right.
> A. Not at all. Mr. Sharp, like I say, is a very quiet person.
> Q. Yes.
> A. I had no conversation with him about it.

Makris contends that the government failed to prove the falsity of his negative responses to the specific question propounded by the SEC interrogator. Precise testimony was adduced at the trial below showing that Makris had discussed with Frank Sharp a scheme to

obtain an interest in securities Makris represented were deposited in European banks. However, the specific question which is the basis of Count I is whether Makris had promised to obtain an interest in, or to return to the United States, a particular group of securities, specifically characterized as ". . . this trust fund . . . of securities allegedy deposited by refugees of Nazi Germany. . . ." The immediately preceding portion of the transcript indicates that "this trust fund" refers to a group of securities ". . . deposited in Zurich, Switzerland."[4]

During his extensive trial testimony, Frank Sharp was asked at least twice whether Makris had ever identified the location of the fund of securities discussed. On each occasion Sharp stated that Makris had merely said that the securities were "on the Continent." Father Kennelly, who had been present on one occasion when Makris discussed the trust fund with Sharp, likewise testified that Makris described the securities as being "in Europe." Furthermore, Sharp testified that Makris characterized the beneficiaries or depositors of this trust fund not as refugees of Nazi Germany but as persons who lived "behind the Iron Curtain." The only other evidence bearing on whether Makris offered Sharp an interest in a Zurich-based trust deposited by refugees of Nazi Germany is the testimony of two agents, one a promoter and one a priest, whom Sharp directed to go to Switzerland to investigate the purported securities-trove. Jimmy Day, the promoter, testified that Sharp had directed him to go to Zurich to arrange for the purchase of stocks and bonds. Similarly,

4. The SEC examiner established his predicate for his question concerning "this trust fund" by stating: "We have information indicating there might have possibly been a trust fund accumulated by the refugees of Nazi Germany with bankers of Zurich, Switzerland."

Father Alchediak testified that he had been instructed to travel to Geneva to assist Sharp and the Jesuit Order in obtaining securities which were held in Zurich. However, since neither Day nor Alchediak was able to testify directly to dissussions between Makris and Sharp, their testimony is at best inferential evidence that Makris may have indicated to Sharp that the interest he was discussing was in a trust fund located in Zurich. Furthermore, neither Day nor Alchediak offered any evidence that Makris had discussed with Sharp a trust "deposited by refugees of Nazi Germany." To the contrary, both testified that when they received their instructions from Sharp to travel to Switzerland, they had been told that the trust property belonged to Makris' family. To further wrap the riddle in mystery Day testified that he was approached in Zurich by a man identifying himself as a member of the Jewish underground who warned him to have nothing to do with the securities because they had been stolen from Jews by the Nazis and that these instruments belonged to the people of Israel.

At trial the government recognized the weakness of its proof of the specific falsity of the Count I testimony. The government contended, however, that it merely needed to show that the defendant intended to make a false and misleading answer to the substance of the question propounded, to-wit: whether be had offered Sharp an interest in any securities trust similar to the one described. This approach would, of course, eliminate the variance between the exact terms of the SEC interrogatory and proof of specific dealings between Makris and Sharp. *See United States v. Laite*, 418 F.2d 576 (5th Cir. 1969). *Laite* was the primary case relied upon by the court below. However, it is clearly distinguishable.

In *Laite* the defendant was convicted of perjury in a wage and hour proceeding for responding negatively to the question "Did you ever tell anybody that you would . . . let them work more than eight hours and just pay them straight time?" This court held it to be legally immaterial whether or not Laite had used the exact words "more than eight hours" since the jury could reasonably infer that Laite had intended a false answer to the substance of the question, to-wit: whether he had told the workers that they could work "overtime" for straight time pay. In the case *sub judice,* Makris was indicted for a negative response to a question which described a particuar trust fund with specific characteristics of ownership and location. The proof not only failed to pinpoint the location of the trust which Makris offered to Sharp, but also, more importantly, it described a different group of persons—communist interns—as the beneficiaries.

In argument to the court below, the government emphasized that the evidence strongly indicated that Makris had intended to deceive the Commission. The court obviously found this factor persuasive. In the interval between Makris' conviction and this appeal, the Supreme Court has unanimously rejected the suggestion that a defendant may be convicted for perjury solely on the basis of his deceptive intentions. In *Bronston v. United States* ____ U.S. ____, 93 S.Ct. 595, ____ L.Ed.2d ____ (1973), the defendant had given a sworn answer which was deliberately misleading but literally true. The court held that regardless of the defendant's intention to deceive or mislead the examiner, there could be no perjury so long as the witness spoke the literal truth. In the present case, while the proof was clear that Makris had offered to obtain for Sharp some securities in Europe, the

government failed to prove beyond a reasonable doubt that Makris uttered a falsehood when he stated that he had never offered Sharp an interest in a trust fund of securities deposited in Zurich by refugees of Nazi Germany.

In contrast to the situation in *Bronston,* ____ U. S. at ____, 93 S.Ct. at 598, the literal truth of Makris' response is by no means certain. But, of course, Makris bears no burden to show that he spoke truthfully. Neither the trial court nor the prosecution had the benefit of *Bronston* when this case was tried. There well may have been some way to prove that the question as propounded was answered falsely. If such proof was available, it was not adduced. Knowing the test of *Laite* is inapplicable to the question involved here, the prosecutor may be able to develop the facts in a different fashion which will convince the trier of fact that Makris lied when he answered this question. The deficiency in the proof in this record of the falsity of Makris' response to the question propounded requires reversal of his conviction on Count I, but since Makris moved for a new trial alleging the insufficiency of the evidence, a decision to retry is in province of the prosecution. *Bryan v. United States,* 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950); *Montoya v. United States,* 402 F.2d 847 (5th Cir. 1968); Wright, Federal Practice and Procedure: Criminal §470 (1969).

In regard to Counts II and III, there is no similar deficiency of proof of the willful falsity of Makris' sworn statements. Count II is based on the following testimony concerning Makris' connection with Father Kennelly of the Jesuit Order:

> Q. All right. Now, concerning this alleged trust fund of securities, we have information indicating that it's alleged to have initially been an amount in

excess of two hundred million dollars, and that there were arragnements made for the two hundred million dollars to be turned over to Catholic societies, principally Loyola University. Do you have any knowledge of that transaction?

A. No.
Q. Have you ever had any dealings with Father Kennally? Do you know Father Kennally?
A. Yes, I know him.
Q. I believe it's spelled K-e-n-n-a-l-l-y.
A. Yes, my son was going to go to his school.
Q. All right. And have you ever discussed this particular thing, this trust fund, with Father Kennally?
A. No.
Q. What have been your conversations with Father Kennally?
A. School.
Q. Just social conversations?
A. Yes, social.
Q. They haven't involved any finances?
A. Absolutely not.

Assuming arguendo that the first question set out in Count II suffers from the same type of overspecificity which created a variance between indictment and proof in regard to Count I, in the following series of questions the SEC interrogator bore down until Makris stated that he had absolutely no conversations with Father Kennally involving "any finances." The testimony of both Sharp and Kennelly shows beyond any reasonable doubt that Makris had conversations with Kennelly involving not only social pleasantries but also a plan for the Jesuits to finance the acquisition of European securities. To sustain a perjury conviction, the government need not show that all the testimony set out in a single count of the indictment is false. It is sufficient to prove falsity in regard to one or more material particulars. *Stassi v.*

United States, 401 F.2d 259, 262 (5th Cir. 1968), vacated on other grounds, 394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed.2d 297 (1969); *Arena v. United States,* 226 F.2d 227, 236 (9th Cir. 1955), cert. denied, 350 U.S. 954, 76 S.Ct. 342, 100 L.Ed. 830 (1956). The proof of the manifest falsity of Makris' assertion that he had absolutely no conversation with Father Kennelly involving finances is sufficient to sustain the conviction under Count II.

Count III alleged perjury in regard to the following testimony:

Q. All right. You are familiar with the name Bedrock Petroleum, is that correct?
A. No.
Q. Have you ever heard of it before?
A. No, I haven't.

Testimony of numerous witnesses demonstrated that Makris had personally negotiated the purchase of the controlling stock of Bed Rock Petroleum, had issued additional stock certificates in the name of that corporation, and had used Bed Rock securities to acquire control of Youngblood's Fine Foods, Inc. The evidence shows Makris' negative response to the SEC questions regarding his knowledge of Bed Rock Petroleum to be false beyond a reasonable doubt. When these questions are viewed in context, the further contention that they are ambiguous (e.g., "Bed Rock Petroleum" might refer to a geological formation) is frivolous.

Makris additionally asserts that the government failed to prove that his testimony which was the subject of Counts II and III was material as required for conviction under 18 U.S.C. § 1621. See, e.g., *Beckanston v.*

United States, 232 F.2d 1, 3-4 (5th Cir. 1956). We find this contention without merit. As this court recently pointed out in *United States v. Gremillion,* 464 F.2d 901, 905 (5th Cir. 1972):

> Under the perjury statute . . . the false statement must be material to the matter in issue. *See* Williams v. United States, 239 F.2d 748 (5th Cir. 1957). The statements need only be material, however, to any proper matter of inquiry—not just to the main issue. United States v. Culverhouse, 436 F.2d 1068 (5th Cir. 1971) . . . The test of materiality is whether the false statement was capable of influencing the tribunal on the issue, Barnes v. United States [378 F.2d 646 (5th Cir. 1967), *cert. denied,* 390 U.S. 972, 88 S.Ct. 1056, 19 L.Ed.2d 1184 (1968)], or whether the false testimony would have the natural effect or tendency to influence, impede, or dissuade [investigatory body] from pursuing its investigation. United States v. McFarland, 371 F.2d 701 (2d Cir. 1966), United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965). The false statements need not actually impede the investigation. Vitello v. United States, 425 F.2d 416 (9th Cir. 1970).

At the time of Makris' SEC testimony, the Commission was involved in an investigation of corporations controlled by Frank Sharp. In particular the Commission had learned of an effort to bolster the financial status of National Bankers Life Insurance Company through the acquisition of securities purportedly held in trust in Switzerland. Information then available indicated that Makris and Sharp had offered a share in the trust fund to Father Kennelly and the Society of Jesuits in return for the seed money necessary to obtain access to the securities. The Commission had an official interest in

any conversations between Makris and Father Kennelly on financial topics which might be relevant to the investigation of National Bankers' Life and related companies. There is no doubt that Makris' false response that he had had absolutely no conversations concerning financial matters with Father Kennelly had the natural tendency to "influence, impede, or dissuade" the SEC examiner from probing more deeply into his involvement with Sharp and Kennelly.

As pointed out above, Makris was summoned to testify before the SEC not only in connection with National Bankers' Life but also in regard to the activities of Ling & Company, a Dallas brokerage house. In particular, the Commission was interested in the role of Ling & Company as a dealer in Bed Rock Petroleum stock at a market price of seven to ten dollars per share. Since there was evidence that Ling & Company had been involved in making an inflated market in Bed Rock Petroleum stock preparatory to the acquisition of control in Yongblood's through a stock transfer, Makris' knowledge of Bed Rock Petroleum and transactions in its securities were highly material to the SEC investigation of the trading activities of Ling & Company.

INSANITY AND COMPETENCY TO STAND TRIAL

In April 1970, approximately eight months prior to his testimony before the SEC and over two years before the trial in the court below, Makris underwent brain surgery for the removal of a pituitary adenoma. Because of the size of the tumor and the location of the pituitary gland, the operation entailed extensive manipulation of the frontal lobes of the brain as well as destruction of the pituitary gland itself. Expert testimony indicates that

this type of radical surgery will affect in varying degree the behavior, personality, and mental condition of the subject.

Prior to trial, the court on the government's motion appointed a highly qualified psychiatrist, Dr. Alfred Vogt, to examine Makris and report to the court on his competency to understand the proceedings against him and to properly assist in his own defense. The report made as a result of the order deals extensively with the appellant's condition not only at the time of trial but also at the time of the alleged perjury. Dr. Vogt's findings are the basis for the Makris' arguments concerning both insanity at the time of the offense and competency to stand trial.

(1) *Insanity at the time of the offense.* Dr. Vogt's report concluded that Makris at all times after the operation had the capacity to know right from wrong. However, it was his opinion that, as a result of a brain injury syndrome resulting from the tumor and consequent surgery, Makris was unable to control his conduct under stress. Although he was initially appointed by the court on the government's motion, Dr. Vogt supplied the most cogent proof for the defense on its pretrial motion to suppress evidence of Makris' testimony before the SEC. In effect, the hearing on this motion became a plenary hearing on Makris' sanity at the time of the alleged perjury.[5]

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5. The motion to suppress alleged that Makris was legally insane and therefore unable to waive his right to counsel before the SEC. At the conclusion of the hearing on this motion, the court found, citing the prevailing legal standard for the defining of insanity, Blake v. United States, 407 F.2d 908 (5th Cir. 1968) (en banc), that Makris had the mental competency to validly waive counsel at the SEC hearing. The denial of the motion to suppress is not asserted as a ground of appeal.

In oral testimony Dr. Vogt amplified the opinion expressed in his written report that Makris suffered from an aberrant capacity to deal with stressful situations. The doctor explained that, while in non-stress circumstances Makris would appear normal and respond rationally, a situation which his mind perceived as threatening danger might reduce Makris to a panic state in which his cognition of external stimuli would be reduced and his responses would become random, unpredictable, and not subject to control by his ego function. Dr. Vogt opined that the SEC hearing must have been just such a stressful experience and that under such circumstances he would expect that Makris had been incapable of comprehending the questions propounded. Further, in response to the questions framed in the language of this court's test of legal insanity,[6] Dr. Vogt stated his belief that Makris had lacked the capacity to appreciate the legal consequences of false answers made during the hearing and was then mentally incapable of conforming his testimony to the standard of veracity required by the law. Dr. Vogt also emphasized that in non-stress circumstances Makris had both the mental ability to conform his conduct to the requirements of the law and the mental capacity to formulate a culpable intent to lie.

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6. This circuit's en banc definition of insanity is as follows:

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

"(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

Blake v. United States, *supra*, 407 F.2d at 916. On the problems and propriety of permitting psychiatric experts to testify in the language of the legal test of insanity, see Goldstein, *The Insanity Defense*, 98-105 (1967).

The government called no expert witnesses to contradict Dr. Vogt's testimony. Instead the prosecution relied on testimony of lay witnesses, including the SEC examiner who observed Makris during the hearing and business associates who had dealt with the appellant after the operation and at about the time of the SEC hearing. On appeal, Makris argues that the trial judge committed error in disbelieving the expert testimony of Dr. Vogt in order to find Makris sane at the time of the offense. Upon a review of the record as a whole, we disagree.

Expert testimony bearing on sanity is not binding on the court; like other forms of expert testimony it may be rebutted by contrary evidence. *Mims v. United States,* 375 F.2d 135 (5th Cir. 1967); *Breland v. United States,* 372 F.2d 629 (5th Cir. 1967); see also *United States v. Alverez,* 458 F.2d 1343 (5th Cir. 1972); *United States v. Harper,* 450 F.2d 1032 (5th Cir. 1971); *United States v. Pitts,* 428 F.2d 534 (5th Cir.), cert. denied, 400 U.S. 910, 91 S.Ct. 154, 27 L.Ed.2d 149 (1970); Cf. *United States v. Collier,* 453 F.2d 1173 (5th Cir. 1972); *Nagell v. United States,* 392 F.2d 934 (5th Cir. 1968); *Brock v. United States,* 387 F.2d 254 (5th Cir. 1967). *Mims* outlines some of the circumstances under which the government may meet its burden of proving sanity despite contrary expert testimony. 375 F.2d at 144-45. It is clear that the probative force of expert testimony is lessened when it is based on observations of the defendant at a time remote from the offense. The weight of expert opinion may be further reduced when the observed conduct of the defendant at the time of the offense does not correspond to that which is anticipated from an individual suffering from the type of defect diagnosed by the expert.

In the present case the opinion of Dr. Vogt was based on observations made more than 16 months after the SEC hearing. The government's lay testimony covered periods much closer to the time of the offense. Business associates testified that Makris had functioned responsibly and predictably while engaged in complex financial transactions. Makris argues that to a mind such as his, which was accustomed to dealing in high finance, the transactions described were not sufficiently stressful to trigger the reaction predicted by Dr. Vogt. However, the government also produced two lay witnesses, one—an attorney who visited Makris on the night before his SEC testimony—who observed the appellant during the period when he was subject to the immediate pressure of his impending appearance and another—the SEC attorney who conducted the interrogation from which the perjury charges arose—who observed Makris precisely at the moment of the offense. Neither of these individuals observed the random, unpredictable behavior which according to Dr. Vogt's diagnosis should have emerged when Makris was placed in what the psychiatrist thought would be a stressful circumstance. The examiner testified that Makris did appear to be tense during his testimony, but no more so than he had found to be normal among witnesses.

An examination of the entirety of the record of Makris' testimony at the SEC hearing fails to bear out the psychiatrist's hypothesis that Makris was in panic at the time of the offense. This transcript clearly confirms the testimony of the examiner that with the exception of a failure to remember certain names, Makris was uniformly responsive to the questions propounded. While evidence presented at the trial showed that certain answers were

factually false, there is simply no basis upon which it can be concluded that Makris failed to comprehend the questions or that his responses were random or unpredictable.[7] Contrary to Vogt's hypothesis that Makris was in a state of stress during his SEC testimony, the transcript shows that he maintained an engaging sense of humor during the proceedings and retained the presence of mind to request the assistance of an attorney when he felt a need for legal counsel.

Thus the evidence concerning Makris', actual conduct fails to bear out Dr. Vogt's hypothesis that Makris' false testimony to the SEC was produced by a mental impairment. The court was well justified in concluding that either Dr. Vogt's diagnosis of a brain injury syndrome was wrong or alternatively, if the diagnosis was correct, that the SEC hearing was not such a stressful situation as to trigger uncontrollable prevarication or other irresponsible behavior.

(2) *Competency to Stand Trial:* 18 U.S.C. § 4244 provides for the appointment of a qualified psychiatrist to examine a person charged with a federal offense where there is reasonable cause to believe that the accused "may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense." See generally, *United States v. McEachern,* 465 F.2d 833 (5th Cir. 1972). Section 4244 further provides: "If the report of the psychiatrist indicates a state of present insanity

7. Under cross-examination, Dr. Vogt indicated that, on the basis of his diagnosis, he would have expected Makris to have committed more mistakes and prevarications in his testimony than were indicated by the transcript of the SEC hearing.

or such mental incompetency of the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto."

The report of Dr. Vogt made as a result of his appointment under § 4244 has been discussed above. In the conclusion of his report, Dr. Vogt stated:

> In reviewing the order for examination I would have to say the patient is not insane, but I do believe he has a type of incompetency [under stressful circumstances]. I believe he is capable to understand the proceedings against him, but I am not too sure how well he can participate in dealing with counsel for the purpose of participating in his own defense.

The trial judge found that this report did not indicate a state of present insanity or mental incompetency as described in § 4244 and, therefore, deemed a hearing unnecessary. We can not agree. The excerpt from the psychiatrist's report quoted above expressed the opinion that Makris had a type of incompetency which might affect his ability to stand trial; it put forward a well-documented doubt whether he was capable of participating in his own defense. This opinion is consistent with other aspects of the report which suggested that under stressful circumstances, which undoubtedly would include a criminal prosecution, Makris might behave irrationally or inconsistently in an attempt to avoid unpleasant consequences. Since the report as a whole indicated a substantial possibility that the defendant was then incapable "properly to assist in his own defense, . . ." under the mandatory provisons of § 4244 the court should have

held a hearing specifically on the issue of the ability of the defendant to assist his counsel prior to beginning of trial.

The failure to conduct such a hearing does not, however, necessarily mandate reversal of Makris' conviction. Only if the appellant was, in fact, incompetent at the time of trial could a failure to hold the hearing required by 18 U.S.C. § 4244 be an error which affected his substantive rights. *Gunther v. United States,* 215 F.2d 493, 497 (D.C. Cir. 1954). Here, the psychiatrist's report, coupled with sworn testimony of defense counsel that the defendant had hindered their efforts by his inconsistent and unresponsive behavior, indicated that the defendant may have been incapable of effectively participating in his own defense. But these indications are by no means conclusive on that issue. The description of Makris' conduct by his trial counsel is equally consistent with the behavior of a fully-rational and self-controlled individual who was attempting to make useful suggestions to his attorneys.

In this judge-tried cause it borders on the anomolous to remand for a hearing especially in view of the lengthy suppression hearing which delved so deeply in Makris' sanity and his competency to understand the warnings given to him at the time of the SEC proceedings. However, because of the lack of a hearing and specific findings on the mental condition of appellant on the date of trial, we are unable to make an adequate review of the decision by the district court to proceed with the appellant's trial. Section 4244 commands that we remand for further proceedings on this issue. See *U. S. v. McEachern,* supra; *United States v. Roca-Alvarez,* 451 F.2d 843, 848 (5th

Cir. 1971); *Whalen v. United States,* 367 F.2d 468, 470 (5th Cir. 1966); *Lewellyng v. United States,* 320 F.2d 104, 106 (5th Cir. 1963).[8]

On remand it will first be the duty of the district court to determine whether it can conduct an adequate and meaningful hearing for the purpose of determining *nunc pro tunc* Makris' competency to stand trial in June 1972. *United States v. McEachern,* supra, 465 F.2d at 839-40 (5th Cir. 1972); *Lee v. Alabama,* 386 F.2d 97, 108 (5th Cir. 1967) (en banc), on remand, 291 F.Supp. 921, 926-27 (M.D Ala. 1967), aff'd, 406 F.2d 466 (5th Cir.), cert. denied, 395 U.S. 927, 89 S.Ct. 1787, 23 L.Ed.2d 246 (1969). Despite the intrinsic problems of such a retrospective determination, see *Dusky v. United States,* 362 U.S. 402, 403, 80 S. Ct. 788, 789, 4 L.Ed. 824 (1960); *Pate v. Robinson,* 383 U.S. 375, 387, 86 S.Ct. 836, 843, 15 L.Ed.2d 815 (1966), in the present case the possibility of an adequate hearing at this time is greatly enhanced by the fact that the trial court will have the benefit of testimony from the court-appointed physician who examined the defendant shortly before trial as well as its own personal observation of the appellant during trial. See, e.g., *United States v. Lewellygn,* supra, on remand, 229 F.Supp. 458 (N.D. Tex., 1963). These observa-

8. This court has consistently rejected the rule followed in the Ninth Circuit where a successful appeal from failure to comply the procedures set out in 18 U.S.C. §4244 results in the vacation of judgment rather than remand for additional proceedings with respect to the appellant's condition at the time of trial. United States v. Irvin, 450 F.2d 968 (9th Cir. 1971); Morris v. United States, 414 F.2d 258 (9th Cir. 1969); Meador v. United States, 332 F.2d 935 (9th Cir. 1964); *also see* Holloway v. United States, 343 F.2d 265, 267 (D.C. Cir. 1964); *but see* United States v. Taylor, 437 F.2d 371, 379 (4th Cir. 1971).

tions may, of course, be supplemented by such additional evidence as the prosecution and defense develops during the Section 4244 hearing.

If the district court concludes that it can not conduct a meaningful hearing to determine competency *nunc pro tunc,* or, if, after hearing is held, Makris is found to have been incompetent at the time of his trial, the court must grant him a new trial at such time he may be found to be competent. If the hearing confirms the court's original determination of competency, Makris' conviction on Counts II and III shall stand affirmed but the court shall document its determination of competency by specific findings.[9]

REVERSED, in part, and REMANDED

9. On appeal, Makris argues that the court should have made specific inquiry into the voluntariness of his waiver of jury trial. This issue is closely tied to the larger question of his competency to stand trial and participate in his own defense. If on remand Makris is found to have been competent to stand trial, we hold that he is bound by his written waiver of jury trial. If he is found to have been incompetent to stand trial, the waiver will not be binding at such time as he may be retried.

SUPREME COURT, U. S.
FILED
APR 18 '74

No. 73-616

In the Supreme Court of the United States

OCTOBER TERM, 1973

MICHAEL A. S. MAKRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The principal issue presented is whether the failure to afford a pretrial competency hearing pursuant to 18 U.S.C. 4244 can be cured by a post-trial hearing to determine past competency.

After a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on three counts of perjury at a Securities and Exchange Commission inquiry, in violation of 18 U.S.C. 1621. He was given consecutive sentences of four years' imprisonment on the first two counts and five years' probation on the third. Prior to trial, the court on the government's motion appointed a psychiatrist to examine petitioner and report on competency.[1]

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[1]Eight months prior to his appearance before the Securities and Exchange Commission, and two years prior to trial, petitioner

The court interpreted the psychiatrist's report as failing to indicate present incompetency within the meaning of 18 U.S.C. 4244, and on that basis ruled that a hearing was unnecessary. The psychiatrist then testified in support of petitioner's insanity defense, which the court by its conviction also rejected. The court of appeals held that the pretrial report as a whole indicated a sufficient possibility of inability on the part of petitioner properly to assist in his own defense to have made a Section 4244 hearing mandatory (Pet. App. 30-31). It did not, however, order a new trial, but instead remanded for a *nunc pro tunc* hearing to determine petitioner's competency at the time he was tried, provided that the trial court first determine that an adequate and meaningful *nunc pro tunc* hearing was possible (Pet. App. 32-33). The court of appeals also reversed petitioner's conviction on one count for insufficiency of the evidence, but left it open to the government to retry him on that count (Pet. App. 20).

1. Petitioner notes that the Ninth Circuit has held that a failure to afford an adequate pretrial competency hearing when one was required can be cured only by a hearing to determine present competency and a new trial if such competency is found (see cases cited at Pet. 6);[2] he urges resolution of the conflict between that holding and the decision of the court below (Pet. 8). We acknowledge the conflict but suggest that it is

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underwent brain surgery which entailed extensive manipulation of the frontal lobes of the brain as well as destruction of the pituitary gland.

[2]The same rule is followed in the District of Columbia Circuit. See *Holloway* v. *United States*, 343 F. 2d 265.

not of sufficient importance to require resolution by this Court. While it is true that in *Dusky* v. *United States,* 362 U.S. 402, and in *Pate* v. *Robinson,* 383 U.S. 375, this Court required new trials after hearings on present competency,[3] both decisions were based upon the facts of the particular cases. See 362 U.S. at 403; 383 U.S. at 387. The court of appeals in this case was well aware of both *Dusky* and *Pate,* but it felt that "an adequate hearing at this time is greatly enhanced by the fact that the trial court will have the benefit of testimony from the court-appointed physician who examined [petitioner] shortly before trial as well as its own personal observation of [petitioner] during trial" (Pet. App. 32).

Moreover, a *nunc pro tunc* hearing was conditioned upon a district court determination that an adequate and meaningful one was possible. Petitioner's complaint is therefore premature. The district court may conclude on remand that a *nunc pro tunc* determination of competency is not now possible, or, upon now considering the issue, it may decide that petitioner was not competent. This Court should not now consider the relatively abstract question whether a *nunc pro tunc* competency hearing can ever be granted, but should wait to see whether one is in fact granted. At that time a record will have been made upon which the court of appeals and this Court can base a decision.

2. Petitioner's other arguments are without merit. His contentions that the convictions on the unreversed

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[3]Both the Ninth and the District of Columbia Circuits placed considerable reliance, in evolving their rule, upon the decision in *Dusky.* Cf. *Meador* v. *United States,* 332 F. 2d 935, 939, n. 9 (C.A. 9); *Holloway* v. *United States,* 343 F. 2d 265, 267 (C.A. D.C.).

counts were based upon answers taken out of context (Pet. 9-10) and that as a matter of law he should have been acquitted on grounds of insanity (Pet. 11-12) were fully considered and properly rejected by the court of appeals (see Pet. App. 20-24 as to the first contention and 25-29 as to the second), on whose opinion we rely. His objection to the possibility of retrial on the reversed count (Pet. 8) is based on the speculative assertion that a competency hearing preceding retrial of that count will necessarily be held contemporaneously with the *nunc pro tunc* hearing; there is no reason to believe that such a procedure is contemplated.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.